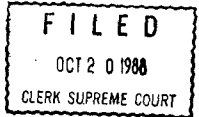


IN THE COURT OF APPEALS OF IOWA



JOE GLUBA and ROBIN GLUBA,)
 Plaintiffs-Appellants,)
 vs.)
CITY OF WEST BRANCH, IOWA,)
 Defendant-Appellee.)

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8-267
87-618

Appeal from the Iowa District Court for Cedar County
(No. 28710) - Max R. Werling, Judge.

Plaintiff appeals an adverse verdict. **REVERSED IN PART
AND REMANDED.**

Hugh G. Albrecht, of the Tom Riley Law Firm, P.C., Cedar
Rapids, for the plaintiff-appellant.

John K. Von Lackum and David A. Elderkin, of Elderkin,
Pirnie, Von Lackum & Elderkin, Cedar Rapids, for the
defendant-appellee.

Considered by Oxberger, C.J., and Sackett and Habhab,
JJ.

SACKETT, J.

We must determine whether the trial court erred in refusing to give an instruction Defendant-Appellee, the City of West Branch, Iowa, could have been subject to liability for its failure to exercise reasonable care in repairing a railroad crossing which by statute was the responsibility of the railroad to maintain. We reverse in part, and remand.

On June 13, 1982, Plaintiff-Appellant Joe Gluba while crossing railroad tracks in the City of West Branch, Iowa lost control of his motorcycle. He was thrown off the cycle and sustained serious injuries.

Plaintiff sued West Branch claiming the city was negligent in failing to maintain a safe roadway and in failing to warn plaintiff of the danger. The case was tried to a jury. The jury returned a special verdict finding no negligence on the part of the city. The plaintiff requested and the trial court refused to give the following instruction:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person.

The requested instruction is contained in section 324A, Restatement (Second) or Torts. The Iowa court adopted section 324A in Thompson v. Bohlsen, 312 N.W.2d 501, 507 (Iowa 1981).

Iowa Code section 364.11 (1981) provides in relevant part:

Street construction by railways. All railway companies shall construct and repair all street improvements between the rails of their tracks, and one foot outside, at their own expense, unless by ordinance the railway is required to improve other portions of the street, and in that case the railway shall construct and repair the improvement of that part of the street specified by the ordinance, and the improvement or repair must be of the material and character ordered by the city, and must be done at the time the remainder of the improvement is constructed or repaired.

It is agreed the portion of the street where the accident occurred is that portion which the railroad company had a statutory duty to repair. The City of West Branch made repairs on the crossing from 1974 through 1982. The plaintiff does not direct us to any evidence or do we find any that the city failed to exercise reasonable care in repairing the street so as to increase the risk of harm. We therefore determine the trial court was correct in not instructing on the issue that the failure of the city to exercise reasonable care increased the risk of harm.

The next question is whether the trial court should have given the second part of the instruction that one who

undertakes a duty owed to a third party is subject to a third party for physical harm resulting from his failure to exercise reasonable care to protect his undertaking.

Restatement (Second) of Torts, section 324A Comment d (1965) provides:

d. Undertaking duty owed to third person. Even where the negligence of the actor does not create any new risk or increase an existing one, he is still subject to liability if, by his undertaking with the other, he has undertaken a duty which the other owes to the third person. Thus a managing agent who takes charge of a building for the owner, and agrees with him to keep it in proper repair, assumes the responsibility of performing the owner's duty to others in that respect. He is therefore subject to liability if his negligent failure to repair results in injury (Emphasis supplied.)

There is evidence the city undertook to repair the crossing and repaired the crossing over an extended period of time. There is evidence at the time and place of the accident there was a large chuckhole which had not been repaired. The city contends they have no duty because Iowa Code section 364.12(2) (1981) provides:

2. A city is responsible for the care, supervision, and control of public grounds, streets, sidewalks, alleys, bridges, culverts, overpasses, underpasses, grade crossing separations and approaches, except those lawfully required to be maintained by a railway company, and the city shall keep all public ways, squares, and commons open, in repair, and free from nuisance (Emphasis supplied.)

However, Iowa Code section 364.11 (1981) provides in relevant part:

If a railway fails or refuses to comply with the order of the council to construct or repair an

improvement, the work may be done by the city and the expense shall then be assessed upon the property of the railway company, for collection in the same manner as a property tax. A tax assessed under this section shall also be a debt due from the railway, and may be collected in an action at law in the same manner as other debts. (Emphasis supplied.)

The city was authorized under the statute to repair the crossing. Because of the language of section 364.11 providing the city may repair the crossing if the railway does not do so, the city contends we are dealing with a discretionary function and they have no liability by virtue of Iowa Code section 613A.4(3) or (4) (1981), which states:

The liability imposed by section 613A.2 shall have no application to any claim enumerated in this section. As to any such claim, a municipality shall be liable only to the extent liability may be imposed by the express statute dealing with such claims and, in the absence of such express statute, the municipality shall be immune from liability.

* * *

3. Any claim based upon an act or omission of an officer or employee of the municipality, exercising due care, in the execution of a statute, ordinance, or regulation whether the statute, ordinance or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the municipality or an officer or employee of the municipality.

4. Any claim against a municipality as to which the municipality is immune from liability by the provisions of any other statute or where the action based upon such claim has been barred or abated by operation of statute or rule of civil procedure.

We disagree. The initial decision to undertake the project falls within the immunity of the planning stage. Butler v. State, 336 N.W.2d 416, 419 (Iowa 1983); Lewis v.

State, 256 N.W.2d 181, 195 (Iowa 1977). The implementation of the decision to repair is operational and decisions made at the operational level are not covered by the discretionary function exception. Butler, 336 N.W.2d at 419.

Having so held, the following instruction should have been given, namely:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking.

We reverse and remand for a new trial.

REVERSED IN PART, AND REMANDED.

Oxberger, C.J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent for the reasons set forth below.

Our supreme court adopted section 324A of the Restatement of Torts 2d in the case of Thompson v. Bohlken, 312 N.W.2d 501, 507 (Iowa 1981). As it relates to subsection (a) of that section, I agree with the majority that the plaintiff has failed to direct to our attention any evidence that the city failed to exercise reasonable care in repairing the street so as to increase the risk of harm. The trial court was correct in not instructing on that issue.

However, I am also of the opinion that the trial court was correct when it did not give plaintiff's proposed instruction as to subsection (b) of that section. Under the facts and circumstances of this case, it has no application.

The significant facts are not in dispute. The plaintiff and a friend were attending a fish fry and barbecue where beer was served. At about 2:00 a.m., plaintiff and a young lady decided on a motorcycle ride. Gas for the cycle was needed, so they traveled to a nearby town. In doing so, they crossed the railroad tracks where this accident occurred. This crossing consisted of three sets of tracks.

The gas station was closed, so they decided to return to the fish fry. The plaintiff turned his cycle around so

as to head easterly and, according to eyewitnesses, he went "through the gears" i.e., accelerated very rapidly. His speed was estimated at 30 to 35 miles per hour. Another witness testified he was "really flying."

When plaintiff reached the railroad track, a witness testified that he "lost it," for he saw the headlights spin. The plaintiff was thrown from the cycle and injured.

Plaintiff claims that his front tire dropped into a large chuckhole. It is clear from the record that this chuckhole was on the railroad right-of-way.

Under section 364.11 (1981), the railroad had the duty to repair at the place where the accident occurred. That section, in relevant part, provides:

All railway companies shall construct and repair all street improvements between the rails of their tracks, and one foot outside, at their own expense

Although the city is responsible for the care of their streets, it has no obligation to repair portions that must lawfully be maintained by the railroad. Iowa Code § 364.12(2) (1981). If the railroad fails to comply with the city's order to repair, the city may make repairs and assess the railroad property, but it need not do so. Iowa Code § 364.11 (1981).

When I review the evidence, I find testimony that the city in the spring "when frost would go out . . . would take some patching material there and smooth up the crossing." Most of the work performed was "on the east

side of the tracks, always, because the main line, or the tracks to the west, is up against the paved street, so there wasn't much of anything ever done on that side."

The plaintiff's problem resulted from a chuckhole located on the western part of the railroad right-of-way. The plaintiff claims liability on the part of the city under subsection (b) of section 324A for its failure to repair the chuckhole. I do not agree.

Merely because the city in the past voluntarily undertook to "smooth up the crossing from winter damage" does not impose upon it a continuous duty to maintain the crossing. To impose liability under section 324A(b) based upon a voluntarily or gratuitous act means in the absence of an agreement denoting otherwise that the act complained of must be an affirmative act, not an act of omission.

Plaintiff cites us to Thompson v. Bohlken, 312 N.W.2d 501, 507 (Iowa 1981), and Case v. Sioux City & Siegal, 69 N.W.2d 27 (Iowa 1955), to substantiate his position. But in each of those cases it was asserted that the defendant negligently performed a duty owed the plaintiff; in Thompson it was alleged the defendant negligently performed a gratuitous inspection and in Case it was alleged the defendant negligently repaired a sidewalk. But here recovery is not sought on the theory that the city negligently performed an act.

Nor do I believe that the comment under (d) of section 324A is applicable here. That subsection implies that an agreement exists between the actor and the person who has the duty, i.e., "Thus a managing agent who takes charge of a building for the owner and agrees with him to keep it in proper repair, assumes the responsibility of performing the owner's duty to others in that respect. He is therefore subject to liability if his negligent failure to repair results in injury." But here no such agreement exists.

Section 323 of the Restatement (2d) of Torts parallels section 324A. Comment c to section 323 is applicable here. It provides:

The fact that the actor gratuitously starts in to aid another does not necessarily require him to continue his services. He is not required to continue them indefinitely, or even until he has done everything in his power to aid and protect the other. The actor may normally abandon his efforts at any time unless, by giving the aid, he has put the other in a worse position than he was in before the actor attempted to aid him. His motives in discontinuing the services are immaterial. It is not necessary for him to justify his failure to continue the services by proving a privilege to do so, based upon his private concerns which would suffer from the continuance of the service. He may without liability discontinue the services through mere caprice, or because of personal dislike or enmity toward the other.

Thus in the case at bar the city has the right, without incurring liability, to discontinue whatever services they were performing voluntarily.

I believe that the case of LaFond v. United States, 781 F.2d 153 (8th Cir. 1986), is instructive. There the government shoveled a path through the sidewalk, piling the removal of snow on both sides of the pathway, and thawing caused icy patches to accumulate. Id. at 154. The plaintiff fell on the ice. Id. In his suit, the plaintiff argued that the government assumed the duty of keeping the sidewalk clear and therefore was liable for doing so in a negligent manner. Id. He cited section 324A of the Restatement. Id. The eighth circuit cited with approval the following taken from Abar v. Ramsey Motor Service, Inc., 195 Minn. 597, 263 N.W. 917 (1935), where it is stated:

Occupants and owners of property abutting city streets often do clean and attempt to clean the sidewalk in front thereof. Their worthy efforts should not be discouraged by holding them liable where no liability otherwise exists, simply because they endeavor to free the sidewalk of snow and ice.

LaFond, 781 F.2d at 155.

I would affirm the trial court in all respects.